

Water Pollution Control Advisory Council (WPCAC) Meeting
August 25, 2005 9:30 a.m. – 2:00 p.m.
Director's Conference Room 111 Metcalf Building

Attendees:

Council Members:

Terry McLaughlin, Smurfit-Stone Container Corp.
Scott Seilstad
Shannon Dunlap, Golden Sunlight Mines, Inc.
Robert Willems, Soil & Water Conservation District
Don Skaar, Montana Chapter of American Fisheries Society
Barbara Butler, Billings Solid Waste Division
Mark Pitman, Schwarz Architecture & Engineering Inc.

Other Attendees:

Bob Bukantis, Department of
Environmental Quality (DEQ)
Bonnie Lovelace, DEQ
Chris Levine, DEQ
Claudia Massman, DEQ
Dave Feldman, DEQ
Mark Bostrom, DEQ
Kari Smith, DEQ
John Arrigo, DEQ
Frank Gessaman, DEQ
Patricia Ramos, Northern
Cheyenne Environmental
Protection Department (NC
EPD)
Joe Walks Along Jr., NC EPD
Jim Domino, Department Natural
Resources and Conservation
(DNRC)
Jay Bodner, MT Stockgrowers
Don Allen, WETA

Call to Order

Chairman Terry McLaughlin called the Water Pollution Control Advisory Council meeting to order on August 25, 2005 at 9:30 a.m. A round of introductions was conducted.

Update on Membership of Council

Bob Bukantis said that the Department has not yet heard anything on the Governor's intention of remaking the Council, so the Department is moving forward with the existing Council until further notice. The Department plans on submitting recommendations to the Governor to fill the three vacant seats. John Wilson, Marc Lorenzen, and Bill Griffin have all recently resigned the Council. Bill Griffin appointed Dave Schwarz as an alternate that the Department is going to forward to the Governor as a nomination to represent irrigated agriculture. This may prompt the Governor to change the Council or indicate that the Department is to continue to move forward with the current Council.

Approval of Agenda

Terry McLaughlin asked for additions or changes to the agenda. There was a request to switch the 11:00 agenda item with the 12:00 agenda item.

A motion to approve the modified agenda was made and seconded. The motion carried and the agenda was approved.

Approval of Minutes for July 6, 2005 Council Meeting

Terry McLaughlin said the Council received the draft minutes and had an opportunity to provide feedback/comment before this meeting. There were no comments or edits from the Council.

A motion to approve the July 6, 2005 minutes was made and seconded. The motion carried and the July 6, 2005 minutes were approved as written.

Briefing Items

Update on “Water Beyond Methane” Petition for Rulemaking

Bob Bukantis said that the Council forwarded a recommendation to the Board that the Board not accept the petition from Northern Plains Resource Council and others. This petition asked BER to consider rulemaking for changing some of the nondegradation provisions in the water quality standards dealing with EC and SAR for the Tongue/Powder/Rosebud drainage and to provide detailed rules on how CBM development should be regulated. The Department did take the Council’s recommendation seriously and did include it in a packet to BER. BER chose to accept the petition in total. This means that BER is going to start the rulemaking process. This does not necessarily mean this rule will go into place. The Board thought it was worthy to hear and revisit the technical debate on CBM regulation and on the particular nondegradation portion of the standards. The Board will most likely modify what has been proposed. Public hearings scheduled to take public comment on the proposed rulemaking are on November 9th in Lame Deer, November 10th in Miles City, and December 2nd at the regularly scheduled BER meeting in Helena. The Board did receive detailed technical comment from both sides at their meeting. The final vote was five in favor of the petition and one opposed.

Briefing/Discussion: Water Protection Bureau, Approaches to Setting New Water Quality Discharge Permit Fees

Bonnie Lovelace said the Department came to the Council earlier this year with the understanding that the Department had to pay for an EIS the legislature appropriated spending authority for. This is now off the table, which takes the burden off the fee program. The Department is looking for advice from the Council on possible methods of increasing discharge permit fees and will approach the Council later with a rule package with actual numbers.

The law is very specific and gives the Department clear direction on how to go about the fee program. The law has provisions in it that says the Department has to collect what they are budgeted for in the appropriation process. Most of the money goes to the Permitting Division, but a small amount of it supports the Enforcement Division, the Water Quality Standards Section in the Planning Division and the Legal Unit. Permitting spends approximately \$1.5 million/year and collects approximately \$1.5 million/year. Permitting is budgeted this year for \$25,000 more than what will be collected.

Terry McLaughlin said the Legislature appropriates the money but the Department has to collect the money. Is the Legislature actually appropriating the money or just indicating what the Department is allowed to spend?

Bonnie Lovelace said the Department gets an authorization to spend. By law, the Department already has the authorization to collect fees. This law indicates that in developing and implementing those fees, the Department must do it in accordance to the budget appropriation. There could be more money in the account but the Department can only spend what the Legislature indicates the Department can spend. Currently it is balanced with no extra money in the account. In the past, there was extra money in the account so the Department did not change the rules on fees from 1994-2002. If the Department spent everything they have spending authority for this year, there would not be enough money in the account. The Department is doing a few economies to make ends meet this year. The Department is planning to move forward with some kind of fee rule over the next several months to have the rules completed by the end of the fiscal year when the Department has a better feel for what will be collected the following year.

The law indicates that there will be application fees and annual fees. A flow-based condition in the rules essentially means a person pays to pollute. For the larger permits where there is a large out of pipe discharge, the Department does measure it for surface water. It is not logical to measure the flow for some permits, such as AFOs or discharges that do not come out of a pipe. The law is very specific about compliance and fees being related. There is a provision that indicates if a permittee is in compliance all year, the permittee receives a 25% discount on the annual fee. The law does allow for a gradational discount for different kinds of compliance, but no regulations have ever been established to do this. The Department is developing a database that can accommodate this if the Department decided to use this option. In this last legislative session, CAFOs fees were put into law and in 2003 suction dredging fees were put into law. These two fees are no longer done through rulemaking so the rules will have to reflect these changes.

The Department tries to build the fees based on the amount of work that goes into the permit and what the Department pays in staff and operations to issue a permit within a reasonable fashion within the framework of the rule. To establish this, the Department occasionally does time studies that help determine how much staff time is put into specific kinds of permits. This does not account for everything because of the provision to pay to pollute. The larger dischargers do have to pay more than the amount it costs the Department to issue the permit. The Department will target the recommended changes towards the studies that are being done to justify the changes. The projections the Department has done show that the balance at the end of a fiscal year will be dropping by tens of thousands of dollars each year over the next few years. It would be ideal to have enough money in the account at the end of a fiscal year to run the program for the next year. The fiscal year is from July 1 to June 30 and the major billing cycle begins in January with 30 days to pay and 90 days before receiving a violation. In many cases this means the money is not received until the end of the fiscal year so there needs to be a balance in the account to run the program for most of the year.

Kari Smith said the discussion would focus on the schedule of events in table III.A of the handout. The Department wants to include a line item for land application for both industrial wastewater and domestic wastewater that is generated from a publicly operated treatment works

(POTW), groundwater domestic wastes and groundwater for industrial or other wastes. The Department would like to bring some equity in the groundwater for industrial or other wastes section. Currently there are facilities that are discharging less than 2,000 gallons/year of industrial wastes that are paying the same as facilities that are discharging 15 million gallons/year. Rather than have a wide range, the Department would like to break that into something similar to the flow-based permits.

The CAFO legislation that went through took the \$300 and \$250 limits based on the number of animals and changed it to a straight \$600 for application fees and \$600 for annual fees. The annual fees for a privately owned treatment works minor, which was where an individual CAFO permit landed, was at \$1000 for the annual fee. In addition the legislation added the component of a CAFO individual permit so these permits are not included in the same category that industrial facilities are in.

Another area to look at changing is to add a new application provision for each one of the different categories listed. The Department conducted preliminary time studies based on similarly experience level permit writers. One permit writer working primarily on new facilities dedicated 154 hours to writing new permits for one type of facility in one month vs. another permit writer who spent 112 hours working on three separate type of renewals. The renewal process already has the data, the facility has been monitoring, and the facility knows how they are operating so requires less time vs. a facility that has never been permitted, has never been operated, no base line information is available so the permit requires a great deal more time. The Department is proposing to have a higher rate for a new facility permit application fee than the renewal application permit fee to make it more equitable.

Terry McLaughlin asked if new sources would have a different structure based on the type of operation (i.e. municipal, industrial or commercial)? Would those different categories have different levels for the application fees in terms of flow or would there be a uniform rate applied to all facilities?

Kari Smith said the permits would be the same categories that are listed in Schedule III with a different fee rate for new facilities. The application fees are already split out into major and minor facilities, which split out facilities based on amount of flow. The new application fee would be higher than the renewal application fee but consistent with the differences that already exist.

Bonnie Lovelace said that when the Department begins the process of permitting a new source, the Department has to take into account and analyze the flow amount to determine the effluent limits. The flow-based fee is part of the annual fee. The application fee does not use the amount of flow as part of calculating a fee; it is based on the work required to get a facility permitted before beginning discharging. The Department is considering using the categories in Section I and putting a line item for a new facility for each one or have it in a separate section indicating what the fee would be for a new one of these facilities. After the first 5-year period, the facility would go through the typical renewal process. The larger application fee would only be paid one time.

Shannon Dunlap asked if any other sections within DEQ do something similar to this approach?

Bonnie Lovelace said the air section has begun to do something similar to this approach.

Don Skaar said that the Department's expenses were matching the budget. If the Department implements this proposed method and made the account plush, could the Department lower the fees for renewal?

Bonnie Lovelace said that the expenses were close to what was collected but it was beginning to go over. In certain months, there may not be enough money in the account so the Department needs to be very careful in spending the money. By the time the Department puts in the raises the Legislature approved, the balance in the account will drop quicker. If it looks like the Department over estimated the amount of money needed to run the program, the Department could come back at any time and reduce the fees. There are regulations indicating state governments cannot hold a balance in an account beyond a certain amount.

Terry McLaughlin asked if there was a cap mandated for an operating reserve? What would happen to the funds if the Department went over the maximum amount allowed in an account?

Bonnie Lovelace said there was not a cap on an operating reserve. The Division tries to keep enough money in the accounts to run the fee programs for a month. Projections are made every month and are used to determine where the program is, where the expenses are, and what is the future status of the account. There is a cap on the maximum amount for some of the fees in place that could affect rulemaking and require going to the Legislature in the future to change. Money over the maximum amount allowed in an account would remain in the account and could not be used by anyone not authorized to use it. Law defines the way the account is used and there are only certain uses allowed. When the Legislature appropriated the money for the Gallatin EIS, there was a legal memo written that indicated the money from this account could not be used for that purpose. If the amount greatly exceeded the cap, the Department would reduce the fees.

Scott Seilstad said there was a concern that the fee may be excessive and a person may feel they could not afford to start up a facility.

Bonnie Lovelace said the Department is required to stay within the appropriation, which puts a cap on any numbers that may be developed.

Bob Willems said the Department gave a good explanation of the problem and the cure. It sounds reasonable and would suggest continuing to view it reasonably and work on implementation.

Terry McLaughlin asked if the Department has a feel of how many new applications is processed per year?

Bonnie Lovelace said the Department receives approximately 250 318 permits a year. These are one-time fees paid to do disturbances to drainages as part of a project and then it is

over. The Department issues over 700 permits a year total. Individual permits get the most attention. The Department does try to prioritize new facilities and get them going. In the last backlog plan there were approximately 25 permits in the FY05 work plan. Renewals can be set aside because there is a permit already in place. The Department has hundreds of renewals to work on now.

Barb Butler asked where would municipalities fall under for storm water? Would the permits be proportionally more for an individual permit vs. general permit?

Bonnie Lovelace said the MS4 permits have a given annual fee of \$650 per outfall with a maximum of 5 outfalls. The renewal application, which is required every 5-years, would be \$650 per outfall. The individual permits would be greater than the general permit. The individual permits will have a higher new facility application fee.

Terry McLaughlin said it makes sense to have a separate class that would be just for new source application fees and for those fees to be greater than the renewal fees because of the work required for a new facility. The Department will have to determine how to scale the fee increase based on the amount of hours put into developing a new permit vs. a renewal permit. The Department can build on their existing time studies and develop a ratio or rationale to support the increase in the fees.

Scott Seilstad said the Department has to focus on just trying to stay even without penalizing existing facilities.

Marc Pittman asked if there are special things the Department is going to look for in the reapplication that would be significantly different than the annual review? Would the fees for a renewal be close to the annual fees?

Bonnie Lovelace said that many of the renewals are operations as usual. There are cases of facilities indicating that they may do something differently in the next 5-year period. The renewal fee would be set at the typical application fee, which is close to the annual fee. EPA guidelines that may change or technologies that change will require more work than a normal modification but will still be classified as a renewal. Changes to a facility need to be done through a modification and may not be linked to a renewal process.

The Department will go forward with this approach and come back to the Council with a proposed rulemaking. When the numbers for the new facility application is set, the Department will bring it to the Council with the data to back up the numbers.

Discussion of the Council's Role as an Advisory Group

Terry McLaughlin said that after the Council's July meeting regarding the CBM issue and the Board went contrary to the Council's thinking on that issue, there were some comments made by some of the Council members who were discouraged and questioned the value of being on the Council if the recommendations were ignored. What are the Council members views in terms of providing value to DEQ? Are there things the Council can improve to become more valuable?

Scott Seilstad said when an advisory council is formed council members need to recognize the fact that it is just in an advisory capacity. Hopefully the members will see something because of their experience and background that the people putting a question before a council had not anticipated. Recommendations are not necessarily followed, but at least the main group knows the rationale behind what the advisory council voted and will consider that. There are times the recommendation is followed such as in the CAFO rulemaking, which was slowed down to allow the industry to feel good about the rulemaking.

Bob Willems said it seems the Council doesn't play a large part in advisory but there are meetings that do have a lot of good discussion on the topic. This Council has value to DEQ because they put extra thought and work into a topic before presenting it to the Council.

Barb Butler said it would be interesting to be at a BER meeting to see how this Council is received.

Bob Bukantis said there is often reference to WPCAC in testimony before BER. WPCAC's resolution was included as part of the BERs packet but most of the discussion centered on getting current testimony.

Bonnie Lovelace said there have been numerous BER meetings when the BER members specifically ask what WPCAC's recommendation was on an issue. The Board views the WPCAC and APCAC advisory councils as the Department's effort and involvement with the constituent groups and the Board wants to know that the Department has done that. The Department usually includes the Council's recommendations and thoughts on an issue in their write up to the Board.

Shannon Dunlap said that there is a concern that even though the Council makes a recommendation and the Department submits it to the Board, the Department remains neutral on the issues. If the Department remains neutral then the recommendation is meaningless so what good is the recommendation?

Terry McLaughlin said that it is good to remember that this Council is charged with being an advisory group to the Department and not directly to BER. With that being said, it is understood that when the Council recommendation does end up going before the Board it still goes to the Department. The Council has handled a variety of different issues and managed to provide some decent recommendations. This Council does have value to DEQ.

Don Skaar asked if there was anything to prevent the Chairman of this Council of giving an oral testimony before the Board? Verbal testimonies can be a lot more powerful than a written testimony.

Shannon Dunlap said the Department should at a minimum verbally present the Council's recommendation to the Board regardless of their position on the issue.

Bob Bukantis said the Department usually provides hard copies of the Council's resolution. The last BER meeting regarding the CBM issue had time management issues so the Department was not asked to give an oral testimony.

Bonnie Lovelace said that the Council could give verbal testimony. Individual members, the Chair, or a designated representative of the Council can give testimony. APCAC does give verbal testimony.

Terry McLaughlin said it is something the Council will have to consider in the future. It is a way to be present at a Board meeting.

Action Items

Penalty Calculation Rules

John Arrigo said the Enforcement Division enforces 15 different laws on behalf of the rest of the Department. Each of those laws has different penalty amounts. Some of the laws describe factors that must be considered when calculating a penalty. Some of the laws have no factors to consider. This results in a mess of penalty calculation procedures. The penalty calculation is done differently under each law. This is not fair because negligence may be considered 50% of a penalty under one law and 15% under another law. Because of this difference there has to be one staff person who has to be an expert in air penalties and one staff person an expert in water penalties. If one of the staff leaves, the Division loses all consistency.

The purpose of this rule is to consolidate and standardize this process. A work group helped draft up legislation and the product of it was House Bill 429. This law creates a standard set of penalty factors that should be used under all the laws and amended out the existing penalty factors in all the other laws. The Division has to now write rules for this law. These proposed rules are close to final not yet ready for notice to the Board and the final notice may read a little different. The Division anticipates going to BER to request an initiation of rulemaking in December. Given BERs, WPCACs, APCACs and the work group's schedules, the Division wanted to start moving on this now.

The law did not provide any definitions so terms are defined in the proposed rules. One factor that was subject to a lot of discussion was history of violation. The way it is defined in the proposed rules mirrors the law and there will likely be only a few instances where there is a historical violation. History of violation has to be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed (i.e. an air violation cannot be used as history for a water violation). The violation has to be documented in an order or judicial order to qualify as history violation, which means that the violation has to be resolved where a judicial body, either BER or a court, indicates that this has happened. In the past, the Permitting Section will send out violation letters indicating that the permit holder has failed to do something but this does not qualify as history for penalty purposes. The violation cannot be more than three years old or subject to any appeal or judicial review to qualify for history.

New Rule III indicates how to calculate base penalty. The base penalty is calculated by first determining the nature of violation based on: 1) if it harms or has the potential to harm human health or the environment; or 2) if it adversely affects the Department's administration of the law (i.e. paper work violations, such as not submitting monthly reports). Depending upon the

nature of the violation determines which table to refer to. From this table a matrix factor must be determined based on gravity and extent. Extent means the violator's deviation from the applicable requirement, which is broken down into major, moderate, and minor extent. For example if a person discharges without a permit or doesn't submit a permit application it is considered a major extent. If a person has a permit but doesn't submit a monthly DMR for one or two months, it would be a minor extent. It is up to the Department to determine the degree of extent. Gravity means the degree of harm or potential harm or adverse impact to the administration of the statute (depending on the matrix). If a person spills 10,000 gallons of gasoline into a river, it is a toxic un-permitted discharge that is going to cause pollution and a fish kill and may affect a drinking water supply that would be considered major gravity. If a person spills 50 gallons of gasoline on the ground that could get to the surface water, it is less severe. The matrix factor is times by the maximum penalty amount for that law to determine the base penalty.

The base penalty is then adjusted based upon a variety of factors: circumstances, good faith and cooperation, and amounts voluntarily expended to mitigate the impacts of the violation. A penalty can be increased as much as 30% based upon circumstances using the criteria laid out in the proposed rule. The base penalty may be decreased by as much as 15% based upon the violator's good faith and cooperation. The base penalty may be decreased by an additional 15% based upon the amount voluntarily expended to mitigate the impacts of the violation. The Department expects that the companies will cooperate, act on good faith and clean up the spills and return to compliance. If a company just talks to the Department about a violation and corrects it, this is what is expected. The Department would not give them a reduction for good faith and cooperation or amounts voluntary expended unless it is above and beyond what the Department expects. If a company does a root cause analysis, is open in the disclosure of exactly what happened and admits to the violation, it would earn the company good faith and cooperation credit. If a company brings in extra crews, adds equipment that is not required or shuts down or slows down production at a loss to fix things, it would be considered as amounts voluntarily expended above and beyond what is required and would qualify for a reduction.

New Rule V is a consideration of the days of violation. Most of the laws state that each violation is a separate violation and each day of violation is a separate violation. The Department will take the adjusted base penalty and multiply it by the number of days of violation to come to a total adjusted penalty. The Department has put in a concept of continuing violations. Many violations occur for extended periods of time. The days of continuing violation allows the Department, at their discretion, to reduce the penalty for extended periods of time.

The history of violation is not intended be a bad actor provision and prevent a person from ever getting another permit. It is just an inflation factor if there are repeat violations. The way it is defined in the law is restrictive. If there were a historical violation that qualifies for the criteria specified in the law, the Department would increase the penalty. This increase is not increasing the total adjusted penalty. This appropriated percentage is multiplied to the adjusted base penalty and then add to the final total. The Department uses the best information available to determine the economic benefit the violator may have gained as a result of a violation. The Department then takes the estimated dollar value and puts it into an EPA economic benefit module to determine a value and adds the resulting amount to the penalty. The Department may consider other matters as justice may require after the total penalty has been calculated. If the Department finds that exceptional factors make the total penalty demonstrably unjust or

demonstrably inadequate as a deterrent, the Department may use its enforcement discretion to increase or decrease the penalty.

John Arrigo went over an example of how this penalty works.

Barb Butler asked who does the extent and gravity determination and how does the Department come up with that? What would be the appeal process if a person thought the violation was minor but the Department thought it was moderate? How does a company prove their case without potentially affecting the good faith and cooperation and losing the 15% discount?

John Arrigo said that the environmental enforcement specialist in the Enforcement Division with the advice and assistance of management, the attorneys, and program staff do the penalty calculations. In addition to these rules the Department is going to put guidance together, which will help quantify those decisions. For example, with gravel pits, if the company mined one acre beyond the permitted boundary it may be a minor gravity, or mined 10% beyond the permitted boundary it would be moderate gravity. For water it may depend on the toxicity and volume of the release or the degree of the exceedence of the permitted limits will relate to gravity and extent.

When a violation occurs, the Department issues an administrative penalty order. An individual has the opportunity to appeal that order to the BER. A contested case hearing would be held where the issue could be worked out. Most of the time the Department will send a letter to a violator and indicates that the Department thinks there is a violation and what the calculated penalty is. If the facility agrees to pay it, the Department will reduce it a little and enter into an order on consent where the facility agrees to pay the reduced penalty and return to compliance. The Department will then talk to the facility about the details of the violation and the details in the penalty calculation. Even if there is an appeal to the Board, the Department will have these discussion with the facility to try to settle the issue before it goes to a contested case hearing. The Department spends a great deal of time fleshing out the circumstances, facts surrounding the violation and the Department's penalty calculation.

Barb Butler said that until there is a document to give some criteria to how the Department determines the gravity and extent, it seems subjective. There is going to be a lot of cases the Department may think a violation was moderate and the violator thinks it was minor. If questioning the Department's determination automatically loses the violator the chance to reduce the penalty, this system may not work.

John Arrigo said that this is a subjective process. Although the Department is trying to develop explicit rules and guidance that minimizes that subjectivity, it will never be eliminated and the Department will need to use best judgment and consistency to try and do the right thing. If an entity comes forward and argues with the Department, that doesn't automatically mean that entity will not get credit for cooperation. Usually entities that come in and talk to the Department result in a fair exchange and debate of the issues. As long as it is not done adversarially and the entity admits to certain facts that are evident they will likely get some cooperation credit. In the letters sent out to the violator it says that if there is information to show that these violations did not happen or did not happen the way the Department describes them, the Department wants to know.

The main difference between the old system and the new system is in the history. The old system for history used points and multiplied it by a dollar amount. History in the existing rules adds to the daily penalty. Amendments to the existing rules will delete the point process that exists but will keep the definitions for the Class I, II and III violations to help determine minor, moderate, and major extent and gravity. The language in 17.30.2003 that indicates how the Department writes the violation must be kept. The Water Quality Act is unique in that prior to assessing an administrative penalty for some type of violations, the Department must send a letter that provides an opportunity to return to compliance and indicates that if the violator does not return to compliance the Department will fine you \$XXX (penalty amount must be calculated and inserted into the letter). If the violator returns to compliance the Department cannot assess that penalty. A new rule will be added indicating the Department will calculate a penalty in accordance to these new rules.

Marc Pitman asked the decreases for good faith and voluntarily expending money, was the 15% decrease dictated to the Department? Could this amount be more? It may be more beneficial and act as an incentive if this was higher.

John Arrigo said that the 15% was not dictated and could be higher. Violators are expected to clean up the spill and the penalty should be incentive enough to clean up the spill fast otherwise they have two days or more of violation. The negatives need to balance the positives. The WQA is called a strict liability law in that it does not matter how the violation happened, but the Department is directed with seeking penalties for those violations. The Department will recalculate some old penalties to see how they come out in the new system.

Scott Seilstad said the Department should do a cost analysis as far as a violator that hired an extra crew at \$3000 and only saved \$225 in discounts to the fee would not be enough to motivate a violator to expend the extra money.

John Arrigo said there might be times when a violator may not have the funds to expend extra amounts above and beyond the expected. Not every violation and not every violator lends itself to these credits or circumstances.

Terry McLaughlin said there is some value in considering increasing the percentages allowed for the positive factors to decrease the penalty to provide additional incentive to an entity responding to a circumstance. The better job they do up front, the better their chances of being viewed as good citizens. In the gravity and extent tables, because these are ratios, the greater the penalty the greater the potential for variation in the final calculated value. How will the ranges in these tables hold up in a contested case and if it could be deemed arbitrary because it is a range instead of a fixed value? The place for negotiation would be better placed in the other categories instead of in these tables. This would have less of a potential to be deemed an arbitrarily determined factor because it would use a range within the matrix and deriving a fixed point. If a case went to court, the plaintiff would have the potential to discredit the Department's case by asking why the penalty was not based on another number within that range on the matrix.

John Arrigo said that the Department has this same problem now. The current WQA has a range of points. This is where the Department gets into settlement discussions. There has

never been anyone willing to go to court because the Department went with 0.45 instead of 0.43. Some violators are willing to argue the calculation in any way possible. The Department will consider having fixed values in that matrix.

Terry McLaughlin said this is an admirable effort on the Department's part because they are taking such a wide range of policies, procedures, and calculation methodologies and combining them into one method that will be a more effective technique for the Department to administer.

A motion was made and seconded to recommend the Department to move forward with the revisions to the penalty calculation rules. All approved the recommendation and motion carried.

Triennial Review of Montana's Water Quality Standards

Bob Bukantis gave a brief Power Point overview presentation on the triennial review of the water quality standards and the issues being addressed in this review (see Water Quality Standards 2005 Triennial Review Overview Power Point presentation).

Terry McLaughlin went through the proposed rules by section numbers seeking Council members comments on each section. Most changes were error corrections, making things consistent with the CWA, clarifying and cleaning up the language and sections, date and name changes, and the e-coli bacteria change. The New Rules I and II pertain to designation and prohibitions for outstanding resource waters. The Circular WQ-7 portion summarizes the changes that are proposed to the circular.

Bob Bukantis read a letter from ConocoPhillips regarding proposed changes in Circular WQB-7 resulting from updated EPA 304(a) criteria for fish consumption (see August 23, 2005 ConocoPhillips letter and attachment).

Don Allen said WETA appreciated the Department meeting with them to have an opportunity to discuss the fish consumption issue. WETA is disappointed that the Department is going to move forward with this rulemaking. The Department needs better and more complete information. WETA offered and was willing to take it to their members to see about partnering with the State and getting this additional information. WETA feels that Montana should have a Montana number even if it is higher than the number used nationally. WETA will still try to get a Montana specific number.

Jay Bodner said the Montana Stock Growers Association (MSGA) appreciates the Department meeting with them to discuss this fish consumption issue and its ramifications. A few other states have done their own numbers. There is enough variability there to benefit Montana to develop their own number. MSGA would be willing to help in cooperation with the State, to develop a Montana specific number. The State really needs to determine what number best fits Montana. MSGA would hope this could be pushed back a little even if EPA is pushing the State to adopt these numbers. In relation, Montana is not that far behind the other states in adopting these numbers. The State does have a little bit of time to adjust these numbers to better reflect what is here in Montana.

Bob Bukantis said that the ConocoPhillips technical memo, in general, is factually correct other than there is a sense on fish consumption rates that the rest of the country may be going in a different direction. The Department sent out a request from ASIWPCA and pulled out the numbers the other states looked at in terms of criteria. The communication the Department received from Minnesota is that they are going to use 30 grams/day. The other Region VIII states and the tribes set standards for carcinogens at a risk based-level of 1:1,000,000, which means the Montana's value is 10 times higher. All the other Region VIII states, including North Dakota, are going with the 17.5 grams/day for the fish consumption rate. North Dakota currently has a standards packet submitted to EPA Denver waiting for approval. North Dakota went a step forward and adopted the EPA proposed lower, more protective MCLs for drinking water. The Department feels that using the 17.5 grams/day fish consumption rate is consistent with what the rest of the Nation is doing.

Don Skaar said that he supports the Departments efforts but if there were some effort to establish a Montana number, Fish, Wildlife and Parks (FWP) would participate in the effort. FWP works with Health and Human Services on mercury fish consumption advisory. EPA's value is a well-founded value and in lieu of a Montana specific number, DEQ should go forward with it. If there was a Montana specific number, this issue could be revisited at that time.

Terry McLaughlin asked if it was possible to have the standards revised but deemed to be on an interim basis pending additional information that may modify the number?

Bob Bukantis said there is a temporary water quality standard but it is not used for an interim bases pending additional information that may modify the standard. The Department is required every three years to review and revise the standards as appropriate. Montana has not been focused on the Triennial Review as much as on reviewing and revising the standards as issues suggest or as new technology is developed. This leads to a continual updating and modifying process as the Department moves along. It would be inappropriate and un-defendable to indicate that a standard was in place until further action was taken.

Scott Seilstad said it is difficult to gauge the fish consumption rate because there is a lot of fish imported into the state and a lot of areas that have catch and release fishing. The Department is not talking about a lot of fish. More than doubling the existing number does have an effect on the water quality standards in terms of meeting those standards. It would be good to have a Montana specific number. How this number affects the water quality standards is the main concern.

Bob Bukantis said that 17.5 grams of fish per day equates to two meals a month. Adopting this number is a risk management issue. There is a lot of uncertainty built into all the water quality standard numbers. There is specific science applied to these numbers and there is built in margins of error. To put this into perspective, the standard for Acrylonitrile is being lowered from 0.59 µg/L to 0.51 µg/L, which is a relatively small change, compared to some of the other standards. Vermont, who is still using the 6.5 grams/day, is using 0.059 µg/L for Acrylonitrile, this is more protective than Montana because Vermont uses the lower cancer risk level.

Terry McLaughlin asked why would EPA approve Montana's standards on the 1:100,000 risk basis? Is it possible that if this fish consumption rate is adopted and lowers these 73 parameters, it could still be ten times more lax than the other states that use 1:1,000,000?

Chris Levine said EPA's standard options are 1:100,000 to 1:1,000,000. EPA also says that this is a risk management decision for the state to make in terms of what level of increased cancer risk for the human health parameters to use. Montana, through legislative action, set the risk level at 1:100,000. The fish consumption is a risk management issue as well. The fish consumption number is set at the 90th percentile risk protection of the U.S. population, which means there is 10% of the population not protected. If the Department does decide to develop a Montana specific number, the Department will have to determine the target population to protect: children, pregnant women, or elderly people. The number Montana adopts could be ten times more lax than the other states.

Barb Butler said it was good that John Standish from Energy Labs had some input into the RRV issue.

Terry McLaughlin said it is bothersome that the Department is thinking about using sociologic surveys to determine water quality standards. When a telephone survey is done to see how much fish people eat and is used as justification to lower the standards it makes one wonder what is next in justifying the standards and using it for other areas like beef consumption. There is no science supporting this in terms of establishing a new lower level for a toxicological effect or a carcinogenic effect.

A motion was made and seconded that the Council is in support of the proposed rule changes and the Department should move forward to the Board but encourages the Department to develop a Montana specific fish consumption value. All approved the recommendation and motion carried.

General Public Comment on Water Pollution Control Issues

There were no additional comments from the public.

Agenda Items for Next Meeting

Suggested agenda items for the next meeting include an update on BER's decision on the WQB-7 packet and an update on the CAFO legal issues.

Terry McLaughlin adjourned the meeting at 2:00 p.m.